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CITATIONS

634219—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 870

THE ACME POULTRY CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the oral opinion of the district court upon petitioner's motion to correct the judgment (R. 48–55) nor the opinion of the circuit court of appeals (R. 62–67) has yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 21, 1944 (R. 67). The petition for a writ of certiorari was filed January 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.[1]

QUESTION PRESENTED

Whether the trial court erred in increasing an unpaid fine imposed upon the petitioner corporation from $25,000 to $50,000 in the presence and at the request of the attorney for petitioner, the increase occurring on the same day the fine was originally imposed.

STATEMENT

Three indictments were returned against petitioner and its president, Louis Spatz, in the District Court for the District of Maryland, the first of which charged them in fourteen counts with violations of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904, 925), and the other two in single counts charged separate conspiracies between them and other defendants to violate the Emergency Price Control Act (R. 2–13, 62; see also Pet. 2).[2] Between October 29, 1943, and No-

[1] Attention is invited to the fact that petitioner's appeal to the circuit court of appeals was taken by notice of appeal (R. 56–57), apparently on the assumption that the appeal was governed by the Criminal Appeals Rules. In *U. S. ex rel. Coy* v. *United States*, 316 U. S. 342, this Court held that the applicable statute regulating an appeal from an order of a district court denying a motion to correct a sentence is Section 8 (c) of the Judiciary Act of February 13, 1925 (28 U. S. C. 230), which requires an application for the allowance of an appeal.

[2] The record contains only the proceedings relating to the first indictment; the proceedings concerning the other indictments appear in the opinion of the court below (R. 62–63).

vember 8, 1943, petitioner and Spatz, both of whom were represented by the same attorney, Thomas F. Johnson (R. 30), pleaded guilty to each of the indictments (R. 1, 62), and on the latter date each was fined $25,000 in the case involving the substantive violations and $10,000 in each of the conspiracy cases, a total of $45,000 (R. 62–63; see also R. 46–47). Spatz was present when the sentences were imposed (R. 33). Shortly thereafter on the same day, Milton E. Sahn, an attorney who represented two other individual defendants who had pleaded guilty in one of the conspiracy cases and who had also been fined (R. 30), suggested to Johnson that an effort be made on behalf of the individual defendants to secure a reduction in the fines that had been imposed (R. 31). Three conferences were held with the trial judge in chambers on that day in an effort to obtain a reduction of the fines. At the first two conferences, at which Johnson and Sahn were present, the judge refused to reduce the fines (R. 31–32). At the third conference between Johnson, the Assistant United States Attorney, and the judge, Johnson said that if the fine against Spatz was not reduced, Spatz would have to go to jail, because he could not pay it; he suggested that it would be equitable to reallocate the fines against Spatz and petitioner, since petitioner had received the profits of the transactions which were the subjects of the indictments and it would therefore be fairer that the directors

and the stockholders of petitioner bear a larger portion of the burden (R. 32). At this conference, the judge reduced the fine imposed on Spatz to $15,000, $5,000 in each case, a reduction of $30,000. At the same time the judge raised the fine imposed on petitioner $30,000 by increasing the fine in the substantive case from $25,000 to $50,000, and in one of the conspiracy cases from $10,000 to $15,000, leaving the fine in the other conspiracy case standing at $10,000 (R. 1, 32, 47). Johnson then reported this to Spatz and to Sahn (R. 32). Spatz paid the fine imposed against him, but petitioner did not do so (R. 1, 47–48).

On June 20, 1944, petitioner, who now was represented by Sahn, moved in the district court that the judgment in the substantive case imposing a fine of $50,000 against it be corrected so as to conform to the original judgment imposing a fine of $25,000 (R. 15). It was contended that the court was without power to resentence petitioner "in camera" in the absence of one of its officers, and that the court had no power to increase the sentences originally imposed (R. 16). A hearing on this motion was held before the district judge on July 12, 1944 (R. 21–48), and thereafter the judge rendered an opinion and entered an order which, in effect, denied the motion, except that he reduced the $15,000 fine in the conspiracy case to $10,000 (R. 48–56), the maximum provided by the conspiracy statute (18 U. S. C. 88). The net result was that petitioner's fine was in-

creased from $25,000 to $50,000. On appeal to the Circuit Court of Appeals for the Fourth Circuit, the order of the district court was affirmed without perjudice to the right of the Government to move to increase the $50,000 fine imposed against petitioner in the case charging substantive violations by $5,000, in order to compensate for the reduction in the amount of the fine imposed against it in the conspiracy case (R. 62–67).[3]

ARGUMENT

1. We submit that petitioner's contention (Pet. 6, 7, 8) that the district court was without power to increase the fine imposed upon it is without merit. It is settled that a court has the power during the term in which sentence is imposed to modify its judgment, and the only limitation upon that power which has been recognized is that the sentence may not be increased where a fine imposed has been paid or where the defendant has entered upon service of an imprisonment

[3] While the circuit court of appeals posited its permission to the Government to move for such an increase of the fine on the substantive indictment upon the ground that the adding of $5,000 to the fine which had been imposed in the conspiracy case was "a mere matter of inadvertence or clerical error which can be corrected by a nunc pro tunc order, notwithstanding that the term has expired" (R. 66), we are not persuaded that the passing of the term may not have barred power to add to the fine on the substantive indictment. However, the question is purely academic at this stage of the proceeding and will remain so unless the United States Attorney attempts to take advantage by motion of the leave accorded him by the circuit court of appeals.

sentence; an increase in such a situation would amount to double jeopardy. *In re Bradley,* 318 U. S. 50; *United States* v. *Benz,* 282 U. S. 304; *Ex parte Lange,* 18 Wall. 163. But where a fine imposed has not been paid, nor service of a sentence begun, it is not improper for the sentencing court to increase the sentence during the term. *Rowley* v. *Welch,* 114 F. 2d 499 (App. D. C.); *De Maggio* v. *Coxe,* 70 F. 2d 840 (C. C. A. 2); *Hatem* v. *United States,* 42 F. 2d 40 (C. C. A. 4), certiorari denied, 282 U. S. 887; *Cisson* v. *United States,* 37 F. 2d 330, 332 (C. C. A. 4).[4] In the present case the fine against petitioner was increased on the same day it had been imposed, and no payment thereof had been made by petitioner prior to that time. Moreover, the increase was made at the instance of petitioner's attorney and with the knowledge and apparent consent of Spatz, petitioner's co-defendant and president, for whose benefit the reallocation of the fines against him and petitioner was requested and granted. In these circumstances petitioner has no standing to complain that the trial judge erred in imposing the increased fine.

2. Petitioner's contention (Pet. 6–7, 8) that the increase in the fine was void because it was not made in the presence of an officer of petitioner, is

[4] Petitioner cites no case which militates against this contention. *Roberts* v. *United States,* 320 U. S. 264, forbidding an increase of sentence upon revocation of probation turns solely upon the construction of the Probation Act.

equally without merit. Johnson, petitioner's attorney, was present when the fine was increased, and there is nothing in the record to indicate that he did not have full authority to represent petitioner in all aspects of the litigation. As stated by the court below (R. 65), "There can be no question * * * as to the rule that a corporation may appear in a criminal case by an attorney and that it is bound in such case as in other cases by an appearance of an attorney in its behalf. *Southern R. Co.* v. *State,* 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411."[5] See also *State* v. *Passaic County Agricultural Society,* 54 N. J. L. 260, 261 (1892); Rule 45 of the new Rules of Criminal Procedure, which provides in part: "A corporation may appear by counsel for all purposes."[6] Furthermore, Spatz, petitioner's

[5] In the case cited by the court, it was held (125 Ga. at 290) that where a corporation voluntarily appeared in court by an attorney and demurred to an indictment, it waived service of process upon it.

[6] In the note of the Advisory Committee to this rule, it is stated (Preliminary Draft, pp. 169–170; Second Preliminary Draft, pp. 164–165): "The present practice under which a defendant corporation appears by counsel for all purposes is continued. See 28 U. S. C. § 394; 2 Bishop, *Criminal Procedure* (2d ed. 1913) § 950a, cited in *United States* v. *Standard Oil Company*, 154 Fed. 728, 730 (W. D. Tenn., 1907)."

28 U. S. C. 394 (Sec. 272 of the Judicial Code), cited by the committee, provides:

"In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."

president, was in the custody of the court during the period when Johnson was negotiating the matter of the reallocation of the fines (see R. 65). He evidently had full knowledge of Johnson's efforts in this regard and, so far as the record discloses, made no objection when Johnson informed him that the judge had reallocated the fines imposed upon him and petitioner. (See p. 4, *supra.*)

CONCLUSION

The case was correctly decided below and presents no real conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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